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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **AT SEATTLE**

11 KING COUNTY,

12 Plaintiff,

13 v.

14 ACE AMERICAN INSURANCE
15 COMPANY,

16 Defendant.

CASE NO. C18-1886 RSM
**AGREEMENT
REGARDING
DISCOVERY OF
ELECTRONICALLY
STORED
INFORMATION AND
ORDER**

17 The parties hereby stipulate to the following provisions regarding the discovery of
18 electronically stored information (“ESI”) in this matter:

19 **A. General Principles**

20 1. An attorney’s zealous representation of a client is not compromised by conducting
21 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate
22 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and
23 contributes to the risk of sanctions.

24 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be
25 applied in each case when formulating a discovery plan. To further the application of the
26 proportionality standard in discovery, requests for production of ESI and related responses should
be reasonably targeted, clear, and as specific as possible.

27 **B. ESI Disclosures**

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31 123194.0003/7540151.4

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3 Within 60 days after the Rule 26(f) conference, or at a later time if agreed to by the
4 parties, each party shall disclose:

5 1. Custodians. The five custodians most likely to have discoverable ESI in their
6 possession, custody or control. The custodians shall be identified by name, title, connection to the
7 instant litigation, and the type of the information under his/her control.

8 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared
9 drives, servers, etc.), if any, likely to contain discoverable ESI.

10 3. Third-Party Data Sources. A list of third-party data sources, if any, likely
11 to contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud”
12 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to preserve
13 information stored in the third-party data source.

14 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable
15 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically
16 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.
17 P. 26(b)(2)(B).

18 C. **Preservation of ESI**

19 The parties acknowledge that they have a common law obligation to take reasonable and
20 proportional steps to preserve discoverable information in the party’s possession, custody or
21 control. With respect to preservation of ESI, the parties agree as follows:

22 1. Absent a showing of good cause by the requesting party, the parties shall not
23 be required to modify the procedures used by them in the ordinary course of business to back-
24 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in
25 their possession, custody or control.

26 2. All parties shall supplement their disclosures in accordance with Rule 26(e)
with discoverable ESI responsive to a particular discovery request or mandatory disclosure
where that data is created after a disclosure or response is made (unless excluded under (C)(3)

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3 or (D)(1)-(2) below).

4 3. Absent a showing of good cause by the requesting party, the following
5 categories of ESI need not be preserved:

- 6 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 7 b. Random access memory (RAM), temporary files, or other ephemeral data
8 that are difficult to preserve without disabling the operating system.
- 9 c. On-line access data such as temporary internet files, history, cache, cookies, and
10 the like.
- 11 d. Data in metadata fields that are frequently updated automatically, such as last-
12 opened dates (see also Section (E)(5)).
- 13 e. Back-up data that are substantially duplicative of data that are more
14 accessible elsewhere.
- 15 f. Server, system or network logs.
- 16 g. Data remaining from systems no longer in use that is unintelligible on the
17 systems in use.
- 18 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from
19 mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided
20 that a copy of all such electronic data is routinely saved elsewhere (such as on a
21 server, laptop, desktop computer, or “cloud” storage).

22 **D. Privilege**

23 1. With respect to privileged or work-product information generated after the filing
24 of the complaint, parties are not required to include any such information in privilege logs.

25 2. Activities undertaken in compliance with the duty to preserve information are
26 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

27 3. Information produced in discovery that is protected as privileged or work product
28 shall be immediately returned to the producing party, and its production shall not constitute a
29 waiver of such protection, if: (i) such information appears on its face to have been inadvertently
30 produced or (ii) the producing party provides notice within 15 days of discovery by the
31 producing party of the inadvertent production.

32 4. Privilege Log Based on Metadata. The parties agree that privilege logs shall
33 include a unique identification number for each document and the basis for the claim (attorney-

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3 client privileged or work-product protection). For ESI, the privilege log may be generated using
4 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title
5 and date created. Should the available metadata provide insufficient information for the purpose
6 of evaluating the privilege claim asserted, the producing party shall include such additional
7 information as required by the Federal Rules of Civil Procedure. The parties agree that privilege
8 logs shall be provided no later than 30 days after the date agreed upon for final production in this
9 matter.

10 **E. ESI Discovery Procedures**

11 1. On-site inspection of electronic media. Such an inspection shall not be permitted
12 absent a demonstration by the requesting party of specific need and good cause or by agreement
13 of the parties.

14 2. Search methodology. The parties shall timely attempt to reach agreement on
15 appropriate search terms, or an appropriate computer- or technology-aided methodology, before
16 any such effort is undertaken. The parties shall continue to cooperate in revising the
17 appropriateness of the search terms or computer- or technology-aided methodology.

18 In the absence of agreement on appropriate search terms, or an appropriate computer- or
19 technology-aided methodology, the following procedures shall apply:

20 a. A producing party shall disclose the search terms or queries, if any, and
21 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
22 parties shall meet and confer to attempt to reach an agreement on the producing party's search
23 terms and/or other methodology.

24 b. If search terms or queries are used to locate ESI likely to contain
25 discoverable information, a requesting party is entitled to no more than 5 additional terms or
26 queries to be used in connection with further electronic searches absent a showing of good cause
or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
requesting party within 14 days of receipt of the producing party's production.

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3 c. Focused terms and queries should be employed; broad terms or queries, such as
4 product and company names, generally should be avoided. Absent a showing of good cause,
5 each search term or query returning more than 250 megabytes of data is presumed to be
6 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
7 types.

8 d. The producing party shall search both non-custodial data sources and ESI
9 maintained by the custodians identified above.

10 3. Format. The parties agree that ESI will be produced to the requesting party with
11 searchable text.

12 a. The parties shall produce their information in the following format: single- page
13 images and associated multi-page text files containing extracted text or with appropriate software
14 load files containing all requisite information for use with the document management system
15 (e.g., Concordance® or Summation®), as agreed to by the parties. Each document image file
16 shall be named with a unique Bates Number (e.g. the unique Bates Number of the page of the
17 document in question, followed by its file extension). File names should not be more than twenty
18 characters long or contain spaces. When a text-searchable image file is produced, the producing
19 party must preserve the integrity of the underlying ESI, i.e., the original formatting, the metadata
20 (as noted below) and, where applicable, the revision history. Unless otherwise agreed to by the
21 parties, files that are not easily converted to image format, such as spreadsheet, database,
22 drawing, large quantities of pictures or media files, should be produced in native format. If
23 pictures or media files become particularly relevant, the parties agree to discuss bates-labeling
24 only those relevant files.

25 b. Extracted Text shall be provided in searchable ASCII text format (or
26 Unicode text format if the text is in a foreign language) and shall be named with a unique Bates
Number (e.g. the unique Bates Number of the first page of the corresponding production
version of the document followed by its file extension).

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3 c. If a document is more than one page, the unitization of the document and
4 any attachments and/or affixed notes shall be maintained as they existed in the original
5 document.

6 4. De-duplication. The parties may de-duplicate their ESI production across
7 custodial and non-custodial data sources but must provide all custodians for any documents that
8 had a duplicate removed. Those custodians of duplicate documents will be provided in an “All
9 Custodians” field.

10 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only
11 the following metadata fields need be produced: document type; custodian, and all custodians (as
12 described above); author/from; recipient/to, cc and bcc; title/subject; file name and size; original
13 file path; date and time created, sent, modified and/or received; and hash value.

14 6. Hard-Copy Documents. If the parties elect to produce hard-copy documents in
15 an electronic format, the production of hard-copy documents shall include a cross-reference file
16 that indicates document breaks and sets forth the Custodian or Source associated with each
17 produced document. Hard-copy documents shall be scanned using Optical Character Recognition
18 technology and searchable ASCII text files shall be produced (or Unicode text format if the text
19 is in a foreign language), unless the producing party can show that the cost would outweigh the
20 usefulness of scanning (for example, when the condition of the paper is not conducive to scanning
21 and will not result in accurate or reasonably useable/searchable ESI). Each file shall be named
22 with a unique Bates Number (e.g. the Unique Bates Number of the first page of the corresponding
23 production version of the document followed by its file extension).

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26 DATED: February 28, 2019

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17 **ORDER**

18 IT IS SO ORDERED this 1st day of March 2019.

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21 RICARDO S. MARTINEZ
22 CHIEF UNITED STATES DISTRICT JUDGE
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